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CPLR 202: Court Examines "Place of Accrual" Concept Under the Borrowing Statute

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come a New York resident, thus precluding the possibility that the plaintiff was forum shopping.[11]

The *Jones* decision is a laudable departure from the strict residency test. CPLR 202 seeks to protect New York residents from injustice by exempting them from the bar of foreign and probably unfamiliar limitation periods. Clearly this exemption should extend to the plaintiff in *Jones* who had no contacts with the state where she was injured and became a New York resident immediately after her cause of action accrued. The court's stress on the unique circumstances present should prevent the decision from being used as a precedent for forum shopping.

CPLR 202: Court examines "place of accrual" concept under the borrowing statute.

Under New York's borrowing statute,[12] a cause of action accruing without the state, when sued upon by a non-resident plaintiff, is time-barred if the statute of limitations of either New York or the jurisdiction wherein the cause of action accrued has expired. The facts of *Sack v. Low*,[13] a case recently decided by the Court of Appeals for the Second Circuit, illustrate unresolved issues with respect to the borrowing statute.

In *Sack*, the plaintiffs, residents of Massachusetts, brought an action for alleged federal securities violations against a New York-based brokerage firm. The District Court for the Southern District of New York had dismissed the action on the theory that a previous dismissal of an identical suit involving the same parties by the District Court of Massachusetts on statute of limitations grounds was a decision on the merits and thus operated as a res judicata bar. In vacating the district court's order, the Second Circuit held that the Massachusetts court's adjudication with respect to the statute of limitations was not on the merits. In the absence of an applicable federal statute of limitations, the Second Circuit was then obliged to determine whether the action was time-barred under New York limitations laws.[14] Finding the record

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11 The borrowing statute is designed to prevent forum shopping by non-resident plaintiffs seeking to take advantage of longer New York limitation periods. *See* 1 WK&M ¶ 202.01; 7B McKINNEY's CPLR 202, commentary at 81 (1972).

12 CPLR 202:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

13 478 F.2d 360 (2d Cir. 1973).

14 *Id.* at 365, *citing* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); Holmberg v. Armbrecht, 327 U.S. 392 (1946); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).

insufficient to establish whether the cause of action had accrued in New York for borrowing statute purposes, the court remanded the case to the district court for further consideration of that question.

The significance of *Sack* for New York law is its isolation of two important issues for future consideration: first, what test should be used to determine where a cause of action for fraud arises under the borrowing statute; and second, whether the borrowing statute is applicable if it is determined that the same cause of action has arisen in both New York and another jurisdiction.

With respect to the first issue, the court chose to invoke principles governing the common law action for fraud in New York.[15] It predicted that the New York courts would adhere to the traditional test for determining the site of accrual, as stated in the First Restatement of Conflicts: "when a person sustains a loss by fraud, the place of the wrong is where the loss is sustained, not where the fraudulent representations are made."[16] The court then faced the question of what, if any, effect recent developments in choice of laws rules would have on the determination of the place of accrual for borrowing statute purposes. Specifically, the court considered the possible effect of the New York Court of Appeals' landmark decision in *Babcock v. Jackson,*[17] which marked the beginning of a healthy liberalization of conflicts of law principles. There the Court struck down the rigid rule mandating that the law of the site of the tort must control. While acknowledging that this traditional test lent predictability to the result, the Court reasoned that it ignored any interest, however strong, that a particular state might have in the application of its own laws to the event. The Court thus formulated an approach which compares "the relative contacts and interests"[18] to determine which forum's laws should govern the issue of liability. This general formula has since been clarified by *Matter of Crichton,*[19] which measured the quality as well as the number

[15] An action for fraud was deemed to be the closest common law analogue to an action under Rule 10b-5 of the Securities Exchange Act. 478 F.2d at 365.

[16] RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 377, n.4 (1937). New York holds that a breach of contract action accrues where the event occurs which justifies a suit to recover damages. Hibernia Nat'l Bank v. Lacombe, 84 N.Y. 367, 383 (1881) (in a suit on a dishonored draft, place of breach was the state were drawee was located, not the state where the plaintiff received the draft). In personal injury cases, it has been held that the action accrues where the plaintiff is actually injured, which is not necessarily where the defendant's tortious acts were committed. Myers v. Dunlop Tire and Rubber Corp., 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972).

[17] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[18] *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

[19] 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967). In *Miller v. Miller,* the Court stated that "the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the facts or contacts which obtain significance in defining State

of contacts in an effort to ascertain which state had the greatest overall interest in seeing its laws applied.

The *Sack* court, however, was of the opinion that the New York courts would not apply these concepts in determining the place of accrual under the borrowing statute, in light of the dissimilar policies behind the *Babcock* line of cases and the borrowing statute. The former, stated the court, was intended to ensure that New York's substantive law would control matters in which this state had dominant interests, whereas the underlying policy of the latter is to prevent forum shopping by non-residents and thereby protect New York residents from suits time-barred in the state where the action accrued.[20]

Cogent arguments have been made that modern conflicts of law principles should, in fact, be applied in determining the applicability of the borrowing statute. Professor David D. Siegel presents the following line of reasoning:

> When, today, a contacts grouping leads to the substantive application of New York law, it leads there because the facts of the case give New York so predominant an interest in the case that it is regarded, substantively, as a New York one. To say that the borrowing statute would then apply, leading to the possible application of a shorter foreign period of limitations to the cause, invites this: that which New York has "substantively" (by grouping of contacts) given, a foreign state has procedurally (by application of its shorter statute of limitations) taken away. Such a result is inconsistent with the policy underlying CPLR 202 . . . .[21]

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interests are those which relate to the purpose of the particular law." 22 N.Y.2d 12, 15-16, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 737 (1968).

20 478 F.2d at 367. *See* 1 WK&M ¶ 202.01. The borrowing statute has as a further aim the alleviation of the often harsh results caused by CPLR 207, which tolls the statute of limitations while a defendant is outside the state. By making foreign periods of limitation applicable in some cases, it limits the time in which a defendant can be subject to suit. Without such a provision, a non-resident defendant could be amenable to suit indefinitely.

21 Siegel, *Conflicts of Laws*, 19 SYRACUSE L. REV. 235, 255-56 (1968). Professor Siegel would not, however, apply this thinking to a situation in which foreign law is determined to be applicable under grouping of contacts. Here, he would apply the borrowing statute, thus creating the possible result that the statute of limitations of one foreign jurisdiction may bar an action to which the substantive law of another foreign jurisdiction is applicable. His rationale is that the borrowing statute's policy — to keep foreign claims time-barred elsewhere out of the New York courts — would be undisturbed.

This view has been criticized as being overly favorable to the defendant. *See* Gegan, *Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute*, 47 ST. JOHN'S L. REV. 62, 69-70 (1972). Professor Gegan states: "It might as well be argued that the plaintiff must lose if the laws of any of the states which have significant contacts with the case preclude recovery on the merits." He maintains that the aforementioned policy — to keep unwanted litigation out of New York — should not be the main concern of the borrowing statute, and that this aim is effectuated more appropriately (and, he implies, without such unjustifiable infringement on the plaintiff's rights) by the ever-expanding doctrine of *forum non conveniens*. *Id.* at 70.

This position has been both commended[22] and criticized. Criticism is rooted in the view that to automatically apply the New York statute of limitations to a claim to which New York substantive law has been deemed applicable under the grouping of contacts test ignores the possibility, especially likely in multi-state tort cases, that more than one jurisdiction's substantive law could be applicable to the case, and thus "to specify which was *the* law creating the cause of action would be wholly arbitrary."[23]

The lack of any New York precedent in the direction of redefining "place of accrual" for borrowing statute purposes in less mechanical terms, however, compelled the court in *Sack* to apply the traditional test of the First Restatement.[24] The Second Circuit thus reaffirmed its belief, last stated in *George v. Douglas Aircraft Co.*,[25] that New York continues to treat periods of limitation as procedural in nature and wholly distinguishable from the substantive body of law.[26]

The court then proceeded to address itself to the question of what result should adhere if it is determined by the district court on remand that the cause of action arose, for borrowing statute purposes, in *both* New York and Massachusetts. Again finding an absence of New York case law on the issue, the court examined the policies of two other jurisdictions with respect to simultaneous accrual under their borrow-

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22 *See* Note, *Choice of Law and the New York Borrowing Statute: A Conflict of Rationales*, 35 ALBANY L. REV. 754, 762 (1971). The author argues that the policy behind the conflicts rule, *viz.*, to allow the jurisdiction with the paramount interest in the litigation to fully effect its policies with respect thereto, applies with equal force to the borrowing statute. He further states that "[t]o say a cause of action accrues, for the purpose of the borrowing statute, at the place of the wrong and therefore that a foreign statute of limitations may bar the action is clearly arbitrary and possibly unjustified." *Id.* He maintains that the separation of the statute of limitations from the body of substantive law is a meaningless dichotomy. *Id.* at 767.

23 Gegan, *Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute*, 47 ST. JOHN'S L. REV. 62, 72-73 (1972).

24 The few borrowing statute cases since Babcock afford no inkling that the New York courts are applying its sophisticated teachings, rather than the rigid approach of the First Restatement of Conflicts, to the problem of where a cause of action arose under the borrowing statute. Quite to the contrary, they take a rather simplistic approach, adhering to the mechanical question where the cause of action arose or, in the words of the borrowing statute, whether the "cause of action accru[ed] without the state. . . ."

478 F.2d at 367, *citing* Myers v. Dunlop Tire & Rubber Corp., 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972); Cellura v. Cellura, 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965); Daigle v. Leavitt, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967).

25 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

26 Statutes of limitations for purposes of federal diversity jurisdiction are labeled as "substantive" so as to preclude the federal courts from applying a time period other than that which would be applied by a court of the state in which it sits. The aim is to ensure the same result irrespective of whether the suit is brought in a state or federal court. 1 WK&M ¶ 202.01, at 2-40, n.3, *citing* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

ing statutes. It found that the Minnesota courts apply the statute if a cause of action may be said to have arisen in a foreign jurisdiction, irrespective of the fact that it might also be found to have accrued in the home jurisdiction,[27] while Illinois holds that the suit is time-barred if barred by the statute of limitations of *any* jurisdiction in which it could have originally been brought.[28] The court predicted that New York would take the literal approach followed in Minnesota, *i.e.*, that "without the state" means just that and no more, and that causes of action accruing both within and without the state would be subject to the terms of the borrowing statute. Clearly, should the New York Court of Appeals approve this reasoning, the import of the borrowing statute will grow. The prolific number of interstate transactions today could give rise to many instances of simultaneous accruals.

Both of the issues discussed above deserve attention from the Court of Appeals or, more appropriately, from the Legislature. The borrowing statute should be re-examined to determine whether its policies are, in fact, being effectuated by the present state of the law.

CPLR 203(e): Personal representative denied leave to amend a personal injury complaint to add a timely wrongful death action.

When a plaintiff in a personal injury action dies from his injuries before verdict, report or decision, Estates, Powers and Trusts Law section 11-3.3(b)(2)[29] provides that his personal representative may "enlarge" the personal injury complaint to include a cause of action for wrongful death. When the personal representative attempts to do this after the two-year statute of limitations for wrongful death[30] has elapsed, the question arises whether the death action may be deemed to have been commenced when the original process in the personal injury action was served. Prior to the enactment of the CPLR, this question was governed by *Harriss v. Tams*[31] which held that a new liability or obligation set up in an amended pleading did not relate back, for statute of limitation purposes, to the time when the original pleading was served. Because a wrongful death action involves liabilities separate and distinct from those in a personal injury action,[32] relation back was not allowed when a death action was initiated by

27 478 F.2d at 368, *citing* Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937).

28 478 F.2d at 368, *citing* Strong v. Lewis, 204 Ill. 35, 68 N.E. 556 (1903).

29 N.Y. EST., POWERS & TRUSTS LAW § 11-3.3(b)(2) (McKinney 1967).

30 The two-year period runs from the date of death. N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967).

31 258 N.Y. 229, 179 N.E. 476 (1932).

32 *See* Greco v. Kresge Co., 277 N.Y. 26, 31-32, 12 N.E.2d 557, 560 (1938); Paskes v. Buonaguro, 42 Misc. 2d 1004, 1005, 249 N.Y.S.2d 943, 945 (Sup. Ct. Kings County 1964).